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No. 04-594

Supreme Court, U.S.
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In The
Supreme Court of the United States

LAWRENCE (BUD) MOON, JR., *ET AL.*,

Petitioners,

v.

NORTH IDAHO FARMERS ASSOCIATION, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

BRIEF *AMICUS CURIAE* OF STATE OF IDAHO IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Idaho Supreme Court's opinion below constitute a final judgment or decree under 28 U.S.C. § 1257(a)?

2. To the extent petitioners predicate their constitutional challenge under the Takings and Just Compensation Clauses of the Fifth Amendment on interference with the use or enjoyment of their homes, is the appropriate remedy an inverse condemnation proceeding against the State of Idaho and not invalidation of the nuisance-trespass immunity provision in Idaho Code § 22-4803A(6) (Michie Supp. 2004)?

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BRIEF *AMICUS CURIAE*

The State of Idaho ("Idaho") respectfully submits a brief *amicus curiae* through its Attorney General pursuant to S. Ct. R. 37.4 in support of respondents and in opposition to the petition for writ of certiorari.

INTEREST OF *AMICUS CURIAE*

Petitioners challenge the enforceability under the Fifth Amendment, as incorporated into the Fourteenth Amendment, of the first sentence in Idaho Code § 22-4803A(6) (Michie Supp. 2004). It states that "[c]rop residue burning conducted in accordance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute a trespass." This provision, which took effect on April 23, 2003, is an integral element of Idaho's attempt to encourage compliance with its Smoke Management and Crop Residue Disposal Act ("Smoke Management Act"), Idaho Code §§ 22-4801 to -4804 (Michie Supp. 2004). The Smoke Management Act regulates open-field burning of crop residue throughout the State, and Idaho Code § 22-4803 contains its core regulatory features.

The Idaho legislature found in Idaho Code § 22-4801 that thermal disposal of crop residue furthers certain agricultural and environmental values, such as control of disease, weeds, and pests and protecting water quality. The legislature recognized, however, that thermal disposal generates smoke which may affect public health and therefore, subjected open field burning, particularly in ten north Idaho counties where large amounts of Kentucky bluegrass are grown, to stringent regulation. *Id.* §§ 22-4803(3), -4803A(1), (2) & (5), -4804. Equally important, it urged the Idaho State Department of Agriculture ("ISDA") and the agricultural community more generally "to pursue alternative means to crop residue disposal." *Id.* § 22-4801.

The Act thus requires the ISDA director to determine whether "economically viable alternatives" to thermal disposal exist as a pre-condition to any crop burning. *Id.* § 22-4803(1).

Regardless of whether petitioners believe the Smoke Management Act is adequate to protect their interests under all circumstances, the fact remains that it represents a considerable effort on the part of the Idaho legislature to balance different and, at times, conflicting societal interests. The legislature further concluded that voluntary compliance by the regulated class – farmers, like the respondents – was an important element of the regulatory program. It therefore built into the statute a "safe harbor" provision, Idaho Code § 22-4803A(6), that not only provides immunity against nuisance and trespass actions against compliant growers throughout the State, but also disclaims any intent to create a private cause of action under the Act against compliant farmers in the ten north Idaho counties. Although petitioners challenge only the nuisance-trespass provision, it is plain that stripping away the immunity against those causes of action would significantly undermine the legislative objective of encouraging voluntary compliance with the statute. Idaho has a keen interest in preserving the Act's integrity.

Aside from protecting the Smoke Management Act from piecemeal evisceration, Idaho has a discrete litigation-related interest. It originally was a defendant in this case but was dismissed without prejudice in December 2002 pursuant to a court-approved stipulation under I.R.C.P. 41(a)(1). However, several of the petitioners here then filed a separate class action against Idaho and one of its agencies. *Moon v. State*, No. 2003-2622 (1st Jud. Dist., Kootenai County). That suit seeks varied relief, including damages and/or just compensation in connection with crop residue burning activity during the 2002 season, the prohibition of future burning regardless of its compliance

with Idaho Code § 22-4803, and a declaration of invalidity with respect to the limitation on nuisance and trespass actions in Idaho Code § 22-4803A(6) and two other statutes on the theory that they effect a taking under the federal and state constitutions. Accordingly, the disposition of the certiorari petition has the potential to affect Idaho's interests in the second *Moon* lawsuit.

STATEMENT

I.

At the time the action below was filed in 2002, open field burning of crop residue was governed by a regulatory scheme adopted in 1999. 1999 Idaho Sess. Laws ch. 103 (codified as amended at Idaho Code §§ 22-4801 to -4804 (Michie 2001)). The Smoke Management Act's legislative findings and intent provision granted authority to the ISDA director to promulgate regulations governing crop residue burning and encouraged that department and the Idaho Department of Environmental Quality ("IDEQ") to develop "voluntary smoke management and crop residue burning programs." *Id.* § 22-4801. The legislature also understood that "current knowledge and technology support the practice of burning crop residue" for various agriculturally important reasons but urged the two departments and the agricultural community "to pursue alternative means to crop residue disposal." *Id.*

The 1999 crop residue disposal statute adopted a regulatory approach that specified conditions precedent to any open field burning and additionally imposed special burdens on burning within Benewah and Kootenai Counties. With respect to all crop residue burning in Idaho, it established the following requirements:

- Open field burning must comply with the statute itself and the Environmental Protection and Health Act, Idaho Code §§ 39-101 to -130 (Michie 2002 &

Supp. 2004), and any regulations issued pursuant to those statutes. *Id.* § 22-4803(1).

- Open field burning could occur only after the ISDA director issued a determination that "no other agricultural viable alternatives to burning are available . . . for the purpose of[ ] (a) [d]isposing of crop residues; (b) [d]eveloping physiological conditions conducive to increased crop yields; or (c) [c]ontrolling diseases, insects, pests or weed infestations." *Id.*
- All persons engaging in crop residue burning "must make every reasonable effort to burn only when weather conditions are conducive to adequate smoke dispersion, and the burning does not emit particulates or other material which exceed the state and federal ambient air quality standards." *Id.* § 22-4803(2)(a).
- Open field burning could take place only "in the field where [the crop residue] was generated." *Id.* § 22-4803(2)(b).
- Use of devices to ignite a field for crop residue disposal was permissible only "when the provisions of this chapter, and any rules promulgated pursuant thereto, the environmental protection and health act, and any rules promulgated thereto, are met." *Id.* § 22-4803(4).

With respect to open crop residue burning in Benewah and Kootenai Counties, the statute required:

- Registration with IDEQ of each field where burning was to occur. *Id.* § 22-4803(3).
- Payment of one-dollar-per-acre registration fee. *Id.* § 22-4804.[1]

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[1] Registration fees are deposited into the agricultural smoke management account that, in turn, may be used to finance research to "(i) [d]evelop alternative crops which do not require burning; (ii) [i]mprove burning and cultural practices for crops which may require

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Consequently, except for the registration and fee requirements, the statute's substantive regulation of crop residue disposal was the same throughout the State.

Four years later and after this litigation was initiated, the legislature modified the Smoke Management Act in several substantive respects. 2003 Idaho Sess. Laws ch. 316 ("HB 391"). First, it transferred all regulatory responsibility for the law to ISDA. HB 391, §§ 2, 4 (codified at Idaho Code §§ 22-4803, -4804). Second, it replaced the term "agricultural viable alternatives" with "economically viable alternatives." *Id.* § 2 (codified at Idaho Code § 22-4803). Third, it expanded the registration and associated fee requirements in Idaho Code § 22-4803(3) to include eight additional counties in north Idaho – Bonner, Boundary, Clearwater, Idaho, Latah, Lewis, Nez Perce, and Shoshone. HB 391, §§ 2, 4 (codified at Idaho Code §§ 22-4803, -4804). Last, it added a detailed remedy section. *Id.* § 3 (codified at Idaho Code § 22-4803A). Civil penalties are now available for violations of the statute's requirements in the ten north Idaho counties (*id.* § 22-4803A(1)), with ISDA given investigatory authority (*id.* § 22-4806A(3), (5)). Most importantly for present purposes, the remedial provision added a "safe harbor" provision with respect to activities compliant with Idaho Code § 22-4803:

> Crop residue burning conducted in accordance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute trespass. Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be

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burning; and (iii) [e]xplore alternatives to burning." Idaho Code § 22-4804(2)(a) (Michie Supp. 2004). The account's funds also may be expended to supplement general account appropriations for administration of the smoke management plan. *Id.* § 22-4804(2)(b).

> registered pursuant to section 22-4803(3), Idaho Code, provided such activities are conducted in accordance with chapter 48, title 22, Idaho Code, and rules promulgated thereunder.

Id. (codified at Idaho Code § 22-4803A(6)). The term "safe harbor" is taken from the amended legislative findings and intent provision, now stating in part that "[i]t is the intent of the legislature to reduce the loss to the state of its agricultural resources by providing a safe harbor to farmers when burning crop residues in compliance with this chapter and limiting the circumstances under which agricultural operations may be exposed to claims outside the lawful framework for crop residue burning." HB 391, § 1 (codified at Idaho Code § 22-4801). The safe harbor provision was not made retroactive; *i.e.*, it applies only to conduct occurring on or after HB 391's effective date in April 2003. HB 391, § 5.

II.

No trial has occurred in this matter. As a consequence, the amended complaint provides the most appropriate starting point in assessing petitioners' attack on the constitutionality of the nuisance-trespass immunity provision in Idaho Code § 22-4803A(6).

A. Petitioners are six individuals, including two minors represented by their parents. R., Vol. III, pp. 3-10, ¶¶ 11-21.[2] Each suffers from a condition that affects respiratory functions such as asthma, cystic fibrosis and allergies. *Id.* They reside in north Idaho. Respondents include farmers or corporations that burn Kentucky bluegrass as part of their farming activities in north

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[2] All references are to the record on appeal in the Idaho Supreme Court proceeding below.

Idaho, together with their association. R., Vol. III, pp. 10-16, ¶¶ 22-101.

Petitioners additionally sought to serve as representatives of two classes, denominated as the "minor field burning class" and the "adult field burning class." The first consists of "[a]ll children with a medically diagnosed inflammatory airwave disease" (R., Vol. III, p. 43, ¶ 165), while the second is defined identically except for inclusion of only "non-minors" (R., Vol. III, p. 44, ¶ 166). The district court granted the requested class certification in April 2003. Pet. App. 92a.

Petitioners contend that respondents "create vast plumes of smoke loaded with microscopic soot particles that penetrate deep into the lungs" through thermal disposal of crop residue. R., Vol. III, p. 32, ¶ 123. They allege that even "short term exposure" to very small particulate matter, known as $PM_{2.5}$, generated from the burning "pose[s] a serious health hazard for persons suffering from chronic pulmonary diseases such as bronchitis, emphysema, and asthma; from cardiovascular disease; from cystic fibrosis; and from infections such as influenza and pneumonia." R., Vol. III, p. 33, ¶ 129. Petitioners allege further that, aside from the smoke particulates' health impact, the burning activities have adversely affected "[t]he ability of [petitioners] and members of the Class to enjoy their homes without discomfort, to garden, dig, recreate, excavate, build, or freely use their properties." R., Vol. III, p. 36, ¶ 142.

The amended complaint set out six claims for relief. One of those claims was a request for a specific relief – medical monitoring and scientific testing – to enhance early detection and treatment of health conditions related

to burning activities and has been withdrawn as substantive cause of action although left as a potential remedy. R., Vol. III, pp. 52-53, ¶¶ 215-20. The remaining claims were predicated on Idaho's nuisance statute, Idaho Code § 52-102 (R., Vol. III, pp. 47-49, ¶¶ 179-92), common law trespass (R., Vol. III, pp. 49-50, ¶¶ 193-98), strict liability (R., Vol. III, p. 50, ¶¶ 199-204), civil conspiracy (R., Vol. III, pp. 50-52, ¶¶ 205-14), and the Takings and Just Compensation Clauses of the United States and Idaho Constitutions (R., Vol. III, pp. 53-55, ¶¶ 221-30). The last of these claims was brought only against Idaho and sought prospective and retroactive relief. As stated above, petitioners and Idaho eventually stipulated to the latter's dismissal without prejudice, and the district court approved the stipulation in December 2002. R., Vol. IV, p. 370. No relief is now, or ever has been, requested against respondents under the Fifth Amendment's Takings and Just Compensation Clauses.

B. Immediately after HB 391 became effective, petitioners requested the district court invalidate it under several theories. The only federal law-based claim contended that the elimination of nuisance and trespass actions under Idaho Code § 22-4803A(6) effected a taking proscribed by the Fifth Amendment. The district court agreed, reasoning that "[b]y abolishing nuisance and trespass claims, the Idaho legislature placed these plaintiffs and class members in a situation where they are now powerless to enjoin the injury and damage suffered by grass field burning" and thereby "imposed a servitude on plaintiffs' property." Pet. App. 43a-44a. The court further deemed any interference with "[t]he right to exclusive use of one's land" as a taking under the federal and state constitutions and concluded that "[p]laintiffs have proven through their medical evidence[ ] that they cannot reside in [*sic*] their land during field burning without suffering

injury." Pet. App. 46a. Its takings' analysis placed particular weight on the Iowa Supreme Court's decision in *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999), which invalidated a statutory provision immunizing farm operations in local government-approved "agricultural areas" from nuisance claims. The court drew from *Bormann* the principle that the "elimination of [a] nuisance claim creates an 'easement' in others' property, and if the offending party does not pay for such easement because of statutory immunity, there is a taking without just compensation." Pet. App. 56a.

Respondents then successfully invoked the Idaho Supreme Court's interlocutory appeal jurisdiction under I.A.R. 12, which parallels 28 U.S.C. § 1292(b), to review, *inter alia*, the district court's determination that elimination of the nuisance and trespass causes of action in Idaho Code § 22-4803A(6) constituted an impermissible taking under federal and state law.[3] The Supreme Court reversed,

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[3] Rule 12(a), I.A.R., provides:

> Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

The Idaho Supreme Court has stressed that permissive appeals under Rule 12 are interlocutory in nature and, indeed, are unavailable if a final judgment subject to appeal as a matter of right under I.A.R. 11(1) or (3) exists. *E.g.*, *Idaho Dep't of Labor v. Sunset Marts, Inc.*, 91 P.3d 1111, 1113-14 (Idaho 2004) (exercise of Rule 12 permissive jurisdiction over appeal proper where district court entered improper partial final judgment under I.R.C.P. 54(b)); *State v. Bicknell*, 91 P.3d 1105, 1107 (Idaho 2004) (exercising Rule 12 permissive jurisdiction over "interlocutory" orders that granted suppression motions; the orders "were not

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concluding that "[t]he taking asserted by the plaintiffs is not a physical taking because the plaintiffs' land is not appropriated and because the smoke complained of does not result in a loss of access or of any complete use of the property." Pet. App. 12a. The court instead deemed the alleged taking to be "in the nature of a regulatory taking." Pet. App. 13a. In the absence of any allegation of "a permanent deprivation of all economically beneficial uses of [petitioners'] land[,]" it found no taking under either the federal or state constitution. *Id.*

The Supreme Court additionally disagreed with the district court's determination that the right to maintain a nuisance creates an easement under Idaho law, stating that "[w]e reiterate that Idaho has not recognized a nuisance as an easement, and we decline [petitioners'] invitation to adopt the *Restatement of Property* § 451 [1944] as the law in Idaho." Pet. App. 18a-19a. It expressly declined to follow *Bormann*'s conclusion concerning the status of nuisances as easements under Iowa law. Pet. App. 15a-16a. Last, the court noted the legislature's settled authority under the Idaho Constitution "to modify or repeal common law causes of action." Pet. App. 19a. It therefore entered a declaration that the immunity provision in Idaho Code § 22-4803A(6) did not effect a taking under the Fifth Amendment or the corresponding provision of the Idaho Constitution. Pet. App. 28a.

C. The Idaho Supreme Court issued the remittitur on August 18, 2004, ordering the district court to "comply with the directive of the Opinion, if any action is required." Significant "action" on remand is necessary to resolve petitioners' claims. Although the immunity afforded under

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transformed into final judgments simply because Idaho Appellate Rules 11(c)(7) granted the State the right to appeal such orders simply by filing a notice of appeal within forty-two days").

Idaho Code § 22-4803A(6) precludes nuisance and trespass claims related to crop residue disposal activities compliant with the Smoke Management Act subsequent to the effective date of HB 391, it leaves unaffected those claims predicated on conduct prior to, or non-compliant conduct after, that date. The district court will thus be required to oversee the completion of discovery and trial on the merits of not only the nuisance and trespass claims, but also the strict liability and civil conspiracy causes of action. Because it is possible that petitioners will not prevail on the merits of the nuisance and trespass claims, no assurance exists that the Idaho Code § 22-4803A(6) immunity provision will be relevant to the litigation's ultimate outcome; *i.e.*, the provision is germane only if petitioners succeed in their claim that the pre-April 23, 2003 activity, or that any post-April 22, 2003 noncompliant conduct, constituted a nuisance under Idaho statutes or the common law tort of trespass. *See* Idaho Code §§ 52-101 to -111 (Michie 2000) (defining different types of "nuisance," and specifying remedial scheme); *Walter E. Wilhite Revocable Living Trust v. N.W. Yearly Meeting Pension Fund*, 916 P.2d 1264, 1274 (Idaho 1996) ("[t]respass is a tort against possession committed when one, without permission, interferes with another's exclusive right to possession of the property").

ARGUMENT

I. THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1257(a) BECAUSE THE IDAHO SUPREME COURT'S DECISION DOES NOT CONSTITUTE A FINAL JUDGMENT OR DECREE.

This Court possesses the power to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" where "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the

Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a). No dispute exists that the decision below was issued by Idaho's highest court or that the nuisance-trespass immunity provision is alleged to conflict with the Takings and Just Compensation Clauses of the Fifth Amendment. It is equally uncontroverted that the appellate process did not produce a "final" judgment – or, for that matter, any "judgment" – under Idaho law. The appeal below resulted instead in the determination of an issue directly connected to the nuisance and trespass claims for relief pending before the district court and whose resolution will assist that court in deciding those claims. Under these circumstances, no "final judgment or decree" within the reach of § 1257(a) exists.

The seminal case addressing the finality element is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This Court observed in *Cox* that, since the first Congress, its authority to review state court judgments has been constrained by the requirements now codified in 28 U.S.C. § 1257(a) and that "'[c]onsiderations of English usage as well as those of judicial policy' would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" 420 U.S. at 477. The *Cox* Court nevertheless identified "four exceptional categories of cases to be regarded as 'final' on the federal issue despite the ordering of further proceedings in the lower state courts." *Johnson v. California*, 124 S. Ct. 1833, 1834 (2004). None of those categories applies presently.

First, this is not a case where "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained" – *i.e.*, where "the case is for all practical

purposes concluded." *Cox*, 420 U.S. at 479. Here, as discussed above, petitioners have pending before the district court nuisance and trespass claims for pre-April 23, 2003 conduct that falls outside the scope of the § 22-4803A(6) immunity.

Second, this is not a case where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. It is entirely possible that petitioners will not prevail on the merits of their nuisance and trespass claims, thereby rendering immaterial the question of Idaho Code § 22-4803A(6)'s validity.

Third, this is not a case "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. Should, for example, petitioners prevail on their nuisance or trespass claims with respect to pre-April 23, 2003 conduct but be denied relief with respect to post-April 22, 2003 conduct on the basis of § 22-4803A(6) immunity, they may appeal the latter denial through the Idaho appellate system and, if unsuccessful by virtue of law-of-the-case principles, raise the validity of the immunity provision in new certiorari proceedings. This Court has stated often that it possesses "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation." *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *accord Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982); *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *see also Johnson*, 124 S. Ct. at 1835 ("[i]n the event that the California Court of Appeal on remand affirms the judgment of conviction, petitioner could once more seek review

of his *Batson* claim in the Supreme Court of California – albeit unsuccessfully – and then seek certiorari on that claim from this Court").

Fourth, this is not a case "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 482-83. The Idaho Supreme Court's decision leaves unaffected not only petitioners' pre-April 23, 2003 nuisance and trespass claim but also any post-April 22, 2003 claim predicated on conduct not in compliance with the Smoke Management Act. As such, the decision "merely control[s] the nature and character of . . . evidence" and relief available in the trial court proceeding. For example, had petitioners prevailed below, the litigation would have resumed in the same or quite similar status – ongoing pre-trial discovery with the possibility of a multi-week preliminary injunction hearing in advance of a full-blown trial on the merits – as obtained immediately after the district court's June 2003 ruling concerning the validity of HB 391's immunity provision. *Cf. Pierce County v. Guillen*, 537 U.S. 129, 141 (2003) (neither a "final" judgment nor any *Cox* exception applied where, with respect to a tort action, "the Washington Supreme Court resolved only a discovery dispute" and "did not determine the final outcome of the litigation").

This is a case, however, on all fours procedurally with *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997). There, certiorari was granted to review a determination by the

Alabama Supreme Court, issued in an interlocutory appeal under a procedural rule phrased comparably to I.A.R. 12(a), that the state Wrongful Death Act's limitation on recoverable damages applied in actions under 42 U.S.C. § 1983. 522 U.S. at 79-80 & n.2. The respondent thereafter raised in its merits brief the lack of a final judgment for § 1257(a) purposes, and this Court agreed:

> The Alabama Supreme Court's decision was not a "final judgment." It was avowedly interlocutory. Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in petitioners' complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims.

522 U.S. at 81. So, too, the Idaho Supreme Court's decision resolved one issue in the litigation that affected only two of four claims. Also, as in *Jefferson*, "[r]esolution of the state-law claims could effectively moot the federal-law questions" (*id.* at 82), and the petitioners here, like those in *Jefferson*, "will be free to seek [this Court's] review once the state-court litigation comes to an end" if their federal law-based challenge to the § 22-4803A(6) immunity provision remains relevant after final disposition of their pending claims (522 U.S. at 82-83). In sum, this case, like *Jefferson*, "presents the typical situation in which the state courts have resolved some but not all of petitioners' claims" and thus "founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation." *Id.* at 84.

II. TO THE EXTENT PETITIONERS ALLEGE A TAKING OF THEIR HOMES OR OTHER REAL PROPERTY, THEIR REMEDY LIES IN INVERSE CONDEMNATION AGAINST IDAHO AND NOT INVALIDATION OF THE NUISANCE-TRESPASS IMMUNITY PROVISION.

The petition should be denied on jurisdictional grounds. Even if a final judgment or decree under § 1257(a) existed, petitioners do not present a substantial federal question warranting this Court's review insofar as they seek invalidation of the nuisance-trespass immunity provision in Idaho Code § 22-4803A(6).

A central requirement in any takings litigation under the Fifth Amendment is to identify with particularity the "property interest" allegedly taken by the government. *Cf. Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety"). Petitioners are quite specific in this regard, specifying various interests allegedly possessed in their individual homes. *E.g.*, Pet. 14 ("Plaintiffs' property rights include their right to access their homes, the right to exclusively possess their home, and the right to use their home") (footnotes omitted). This taking allegedly is effected through creation of a "servitude or easement" over their property by virtue of the § 22-4803A(6) immunity provision. Pet. 17. Petitioners nonetheless do not allege a takings claim against respondents or, for that matter, aver that the fair market value of their homes has been diminished. They instead pursue what, in essence, is a mass tort lawsuit, enlisting the Fifth Amendment for the sole purpose of striking down statutory impediments to personal injury damages. Just compensation is not sought.

This Court has emphasized that "only takings without 'just compensation' infringe th[e] [Fifth] Amendment" and that, consequently, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) ("'[t]he Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation'") (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). While four members of the Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), invalidated a statute, which mandated a direct transfer of funds from one private party to another, on the ground that it effected an uncompensated taking, they did so only because no "compensable remedy" existed for the taking. *Id.* at 521 (plurality op.).[4]

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[4] Justice Kennedy provided the decisive vote in a separate opinion, agreeing that the involved statute was unconstitutional but dissenting from the plurality opinion's use of takings analysis to invalidate the law. 524 U.S. at 539 (Kennedy, J., concurring in judgment and dissenting in part). He thus found it "unnecessary to comment upon the plurality's effort to resolve a jurisdictional question despite little briefing by the parties on a point which has divided the Courts of Appeals." *Id.* at 547. The opinion of four Justices dissenting from the judgment similarly did not address the issue substantively but did note the "conceptual difficult[y]" associated with prospective, as opposed to compensatory, relief for a taking. *Id.* at 556 (Stevens, J., dissenting).

Petitioners, however, have an adequate remedy in inverse condemnation against Idaho to redress any claim that either a regulatory or a physical taking of real property interests exists. *First English*, 482 U.S. at 315-16; *see also KMST, LLC v. County of Ada*, 67 P.3d 56, 60 (Idaho 2003); *Covington v. Jefferson County*, 53 P.3d 828, 831 (Idaho 2003); *Killinger v. Twin Falls H'way Dist.*, 17 P.3d 266, 269 (Idaho 2000). No such claim is, or can be, maintained in this action because Idaho is not a defendant. Yet, even were Idaho a party and an inverse condemnation claim were properly before the district court, the nuisance-trespass immunity provision's validity would remain unaffected; *i.e.*, petitioners' claims against respondents would still be subject to the legislative restrictions.

Finally, two brief comments concerning the merits of petitioners' claim are warranted. Their fundamental grievance with the Idaho Supreme Court's decision is the conclusion that crop-disposal smoke dispersion does not constitute a physical invasion. Pet. 19-21. Petitioners rely heavily on the Iowa Supreme Court's determination in *Bormann* that, under Iowa law, a legislative conferral of immunity from nuisance liability gives rise to an easement and therefore, constitutes a physical invasion of the subservient estate. Pet. 22-24; *see Bormann*, 584 N.W.2d at 315-16, 319-21. The Idaho court, as discussed above, departed from *Bormann* on the issue of whether Idaho Code § 22-4803A(6) creates an easement under Idaho law – a determination ordinarily not subject to this Court's review. *E.g.*, *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 814 (1995) ("[t]he judging of questions

concerning rights which depend on state law is not . . . normally assigned to federal tribunals").[5]

The Idaho Supreme Court's holding, and the attendant selection of regulatory taking standards as controlling, is hardly surprising. This Court in *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), held that smoke, fumes and other consequences of proximity to a congressionally-sited railroad did not effect a "'taking' of the [complainant's] land in the ordinary sense" of a physical occupation. *Id.* at 552. It thus distinguished *Richards* in *United States v. Causby*, 328 U.S. 256 (1946), where aircraft overflights were deemed to constitute a physical invasion of property neighboring a military airport, because the earlier case was simply one "of incidental damages arising from a legalized nuisance." The overflights differed since, "if permanent and not merely temporary, [they] normally would be the equivalent of a fee interest" in the nature of an easement. *Id.* at 261-62. The Idaho court's determination that regulatory, not *per se*,

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[5] This Court, of course, held in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), that state property law, not the Fifth Amendment itself, is the source of compensable property interests. Undeterred by such holding, petitioners argue that *Webb's* "stands for the notion that states do not solely determine what is property for takings purposes." Pet. 19. Their reading cannot be squared with this Court's conclusion that the creditors of Webb's "had a *state-created* property right to their respective portion of the [court registry] fund." 449 U.S. at 161 (emphasis supplied). The issue in *Webb's* was whether the state legislature could appropriate interest on the fund by characterizing it as "public money" for a temporary period. *Id.* at 163-64. It was this re-characterization that, along with other considerations, constituted the taking. The Idaho Supreme Court, however, did not re-characterize petitioners' property rights when it declined to construe the nuisance-trespass immunity provision in Idaho Code § 22-4803A(6) as an easement over that property. Its decision left petitioners' property right status exactly as it was preceding Idaho Code § 22-4803A(6)'s enactment.

takings standards governed thus not only was rooted firmly in a state law-based property right determination but also was fully consistent with this Court's precedent concerning the distinction between physical and non-physical takings.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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